JURISPRUDENCE

1. Jurisprudence- meaning, nature and utility

2. Law- meaning, characteristics, purposes and classification

4. Sources of law- Custom, Legislation, Precedent

INTRODUCTION AND MEANING

The term *jurisprudence* is derived from the Latin word *jurisprudentia*, where *juris* means law and *prudentia* means knowledge or skill.
In its literal sense, jurisprudence means the **knowledge of law** or skill in the application of law. In this wide sense, it may be said to include the entire body of legal principles operating in the world.

However, jurisprudence has not always carried the same meaning. Its concept has evolved continuously from the classical Greek period to modern times. During different stages of social, political, and economic development, jurists have understood and defined jurisprudence differently. Therefore, it is difficult to give a single, universally accepted definition of jurisprudence.

In modern times, with rapid social change and increasing complexity of legal problems, jurisprudence has expanded its scope. It now examines not only legal rules but also the relationship between law, society, justice, and morality. Thus, jurisprudence today is not merely a study of legal rules but a philosophical and functional inquiry into law.

Indian perspective of Jurisprudence

Indian jurisprudence has its roots in the ancient concept of *Dharma*, which aimed at regulating human conduct through moral discipline and self-restraint. Dharma was not limited to law but included religion, ethics and social duties. It played a vital role in maintaining social harmony and order.

With the progress of Indian society and the adoption of a modern democratic Constitution, the concept of law underwent significant change. India today is a Sovereign, Socialist, Secular, Democratic Republic. In a welfare State like India, law is expected to act as an instrument of social change and balance individual liberty with social welfare. Therefore,

modern Indian jurisprudence emphasises functional, social and justice-oriented interpretation of law.

DEFINITIONS

Different jurists have given different definitions of the term jurisprudence. Some of the important ones are given below -

1. **Ulpion's Definition**
   He is a celebrated Roman jurist who belongs to a nationalist school. He defined Jurisprudence as 'the observation of things human and divine, the knowledge of the just and unjust'.
   This definition given by him is too broad and might apply to religion, ethics, or philosophy. As todays evolved world law may not be attached to divinity and just and unjust.

2. **Salmond's Definition**
   Initially he defined Jurisprudence as the 'science of the first principles of civil law. Jurisprudence thus deals with a particular species of law; that is, civil law or law of the state. They are enforced by the courts or judicial tribunals and regulate external human conduct only and not the inner beliefs of man. It has characteristic features that distinguish it from law of every other kind.
   In society the conduct of a man is governed by three kinds of law -
   i) The laws of the theologian, and
   ii) The laws of the moralists, and
   iii) The laws of the jurists.

   It is with the jurist laws only that jurisprudence is concerned. The laws of theologian have divine or superhuman source whereas the laws of moralists are man-made laws.

   He later gave a revised definition -
   Jurisprudence is the science of law and a systematic study of essential and fundamental legal principles.

3. **Austin's Definition**
   Austin defines Jurisprudence as the 'Philosophy of positive law'.
   According to him, the positive law or 'Jus Positivium' is the law laid down by a

political superior for controlling the conduct of those subject to his authority.

Thus, the term positive law used by him is analogous to the civil law, but the term philosophy used by him is somewhat misleading because philosophy deals with general theories about things whereas jurisprudence is general theory of only man-made laws.

Austin has divided jurisprudence in two kinds:

i) General Jurisprudence: General jurisprudence is the "philosophy of positive law" concerned with the exposition of the principles, notions, and distinctions that are common to various mature legal systems (e.g., Roman and English law).

ii) Particular jurisprudence: Particular jurisprudence is the science or study of a single, specific, and actual system of positive law as it exists in a particular identified nation or country.

4. **Holland's Definition**
   Holland defines jurisprudence as the 'Formal science of positive law'.
   A formal science is the one which deals not with concrete details but with the fundamental principles underlying them.
   According to him, jurisprudence should deal with general conceptions and pervading principles that constitute the basis of any mature system of law.
   He says, Jurisprudence deals with human relations which are governed by rules of law rather than with the material rules themselves.

BRANCHES OF JURISPRUDENCE

John Salmond categorised Jurisprudence into three main branches:

1. Historical Jurisprudence – Historical jurisprudence deals with the general principles governing the origin and development of law, with influences that affect the law, with the origin and development of those legal conceptions and principles which are so essential in their nature as to deserve a place in the philosophy of law.
2. Analytical Jurisprudence – analyses the first principles of law as they exist in a legal system.
3. Ethical or Philosophical Jurisprudence – It deals with the first principles of ethical significance and adequacy of law.

NATURE OF JURISPRUDENCE

1. Jurisprudence is both science and philosophy.
   Jurisprudence is science because it follows a systematic, logical, and scientific method in the study of law. It classifies, analyses, and arranges legal principles in an orderly manner.
   Although its subject matter is abstract, the approach adopted is rational and methodical.
   At the same time, jurisprudence is also a philosophy of law because it deals with fundamental and abstract questions such as the nature of law, justice, rights, duties, and the relationship between law and morality.

2. Jurisprudence is abstract in nature.
   Jurisprudence is abstract in nature because it is not concerned with particular laws of a specific country or time. Instead, it deals with general concepts, foundational principles, and theories of law such as rights, duties, justice, liability, and punishment. It seeks to understand the underlying ideas of law rather than its concrete application.

3. Jurisprudence is Interdisciplinary
   Jurisprudence is interdisciplinary as it is closely related to several other social sciences like ethics, sociology, psychology, economics, politics, and anthropology. It draws from these disciplines to explain legal principles, social control, human behavior and the functioning of legal institutions, thereby enriching the understanding of the law.

   Link to other disciplines:
   - **Sociology**:
     Sociology studies social institutions and human relationships. Jurisprudence and sociology are closely connected as both aim at regulating social conduct. Criminology, for instance, is an interdisciplinary subject related to both law and sociology.
     The lawyer's approach focuses on enforceability and obedience, while the sociologist examines how laws actually operate in society. Modern jurisprudence increasingly adopts a sociological approach, particularly in prison reforms, correctional services and judicial decisions aimed at achieving social justice.

G. W. Paton supported the law-sociology relationship for three reasons:
first, it helps understand legal evolution;
second, it aligns law with social needs;
third, it provides objectivity in legal interpretation.

- **Economics**:
  Economics deals with production and distribution of wealth, while jurisprudence regulates economic relations through law. Economic conditions significantly influence crime and social behaviour.
  Many laws regulate economic activities, such as laws relating to banking, companies, labour welfare, consumer protection, land reforms, taxation and insurance. Modern welfare legislation aims at improving living standards and reducing economic inequality. Thus, law acts as a means to achieve the economic welfare of society.

- **Political Science**: Jurisprudence is closely linked to political theory, as the State (a political entity) is responsible for creating and enforcing laws. Laws are often a reflection of the political environment and government policies of a country. Concepts like sovereignty, rights, and duties are central to both political science and jurisprudence.

- **Psychology**: This link is crucial in criminal jurisprudence, where understanding the human mind and behavior helps determine the motive behind a crime and the appropriate punishment or rehabilitation program. Psychological evaluations can assess a defendant's mental capacity, competency, and potential risk to society.

- **Ethics**: Ethics is the science of human conduct and moral principles, providing a standard for what the law ought to be. While Austin sought to separate law from morality, many jurists argue that laws should be based on sound ethical principles to be considered just and fair. Ethical jurisprudence examines existing moral standards to suggest necessary legal changes that align with public conscience.

- **History**: History provides the social and cultural context in which laws were created and applied, showing how legal values and beliefs have evolved over time. The historical school of jurisprudence emphasizes that law is not merely a

command but a product of the people's collective consciousness, customs, and traditions (Volksgeist). Studying legal history helps in identifying patterns and trends, ensuring that current laws learn from past injustices.

4. Dynamic and ever evolving
   As society progresses, new forms of relationships, property and rights emerge, compelling jurisprudence to re-examine and redefine existing legal concepts.

   For instance, evolution of the concept of property from merely tangible objects to intangible creations of the human mind led to the development of Intellectual Property Rights. Traditional jurisprudence viewed property in physical terms, but advancements in science, technology and commerce necessitated recognition of intellectual labor as property.

   Similarly, contemporary debates on same sex marriages have led to significant jurisprudential discussions on the nature of marriage as a legal and social institution. Marriage once understood strictly as a heterosexual union, is now being reexamined in the light of constitutional values like equality, dignity and personal liberty.

   Thus, jurisprudence continuously adapts to new realities, reassesses established doctrines and evolve to meet the changing needs of society.

It's essential to recognize that jurisprudence isn't confined to a single viewpoint; rather, it encompasses diverse perspectives. Some scholars view it as a science, while others regard it as a social science influenced by historical, cultural, and political contexts. Despite these varied interpretations, jurisprudence undeniably serves as a cornerstone for understanding legal systems and guiding the development of legal theory and practice.

UTILITY OF JURISPRUDENCE

Jurisprudence is often criticized as being abstract and lacking practical utility. However, jurists like Salmond strongly reject this view and emphasise that jurisprudence has both intrinsic value and practical importance.

1. Interpretation of laws
   It helps judges and lawyers ascertain the true meaning and intent of legislative

enactments, especially where statutory language is ambiguous, thereby ensuring consistent and rational application of the law.

2. Logical Analysis
   The study of jurisprudence sharpens the logical analysis and reasoning techniques of lawyers, enabling them to approach complex legal problems with a deeper understanding.

3. Analytical and critical thinking
   Jurisprudence sharpens the analytical and critical thinking of lawyers. It trains the mind to think in legal terms, detect fallacies, and use precise legal language. It combats excessive legal formalism and encourages lawyers to view law in its social context, focusing on its purpose rather than mere technicalities.

4. Aid to Judicial decision making
   Jurisprudence assists judges when courts enter new legal territories. The Supreme Court of India has emphasised that analytical jurisprudence helps understand existing law, while normative jurisprudence guides courts in developing new legal norms. It plays a crucial role in judicial creativity and interpretation.

5. Jurisprudence as the Eye and Grammar of Law
   Jurisprudence is often described as the eye of law and the grammar of law. It illuminates fundamental legal concepts and basic concepts.
   As Holland observed, the growing complexity of human relations makes empirical knowledge of law insufficient without jurisprudential analysis.

6. Social and Welfare Perspective
   According to Dr. M.J. Sethna, jurisprudence examines the consequences of law on social welfare and suggests reforms. It supports Pound's theory of law as social engineering, requiring constant revaluation to ensure that law serves socio-economic justice.

7. Bridging theory and life
   According to Prof. R.W.M. Dias, jurisprudence brings theory and life into focus. Its primary aim is not to teach what to think, but how to think, making it uniquely valuable in legal education.

LAW

INTRODUCTION AND MEANING

In the general sense, law means a rule of action or standard of conduct to which actions ought to be confirmed. In its legal or judicial sense, law refers to a body of rules of human conduct made and enforced by the state.

As observed by Sir Thomas Holland, law in jurisprudence signifies rules of external human conduct enforced by a sovereign political authority.
Similarly, Hobbes described law as the command of a determinate superior backed by coercive power.

Over time, different schools of thoughts like natural law, positivism, and sociological jurisprudence have contributed to the understanding of law reflecting the changing social needs and human complexities.
Thus, law is not merely a command or a rule but a dynamic instrument for maintaining order, regulating social relations, and ensuring justice in society.

DEFINITIONS OF LAW BY JURISTS

1. Blackstone
   Blackstone is a prominent English jurist. He has defined law as:
   'Law is a rule of civil conduct prescribed by some supreme power in a state, commanding what is right and prohibiting what is wrong.'

   Blackstone links human(positive) law to natural and divine laws, suggesting that human laws have no validity if they contradict the higher laws of nature and God, which are discoverable by reason.

2. Austin
   Austin is a central figure in the analytical school of jurisprudence and the founder of modern legal positivism. He defined law as:
   'Law is the command of the sovereign backed by sanctions.'

   Austin's definition relies on three essential components:

(i) Command: An expression of a wish by a superior to an inferior.
(ii) Sovereign: A determinate human superior who receives habitual obedience from the bulk of society but does not habitually obey any other earthly authority.
(iii) Sanction: The threat of punishment or legal penalty for non-compliance, which provides the motivation for obedience.

3. Duguit
   Duguit is a French jurist associated with the sociological school. He defined law as: 'Law is the rule of conduct which govern the relations of persons in society, and which are observed because of social solidarity and necessity of maintaining social life.'

   For Duguit, law exists to enforce social duty rather than individual rights. He argued that the only right a person possesses is the "right to always do his duty" in a manner that promotes social cohesion and prevents harm to others.

   He viewed the state not as sovereign power above the law, but as an institution performing public functions and bound by the same social duties as individuals.

4. Anonymous Jurist
   Law means norm of conduct for a particular community and accepted by that community as binding and issued by an authority which has power to lay down these rules of general acceptance and enforce them through sanctions.

CHARACTERISTICS OF LAW

The characteristics of law are the fundamental attributes that define it as a unique system of social control, distinguishing it from mere morality or customs.

1. Rules and Regulations
   Law fundamentally consists of a system of rules and regulations that govern behavior within a society.

2. Established by a governing authority
   Laws are created and enforced by a legitimate state or political authority.

3. Binding in nature
   These rules are mandatory and binding on all members of the society and create actual duties and obligations that are not optional. Unlike mere suggestions or moral guidelines, legal rules create actual duties and obligations that individuals *must* adhere to. This mandatory nature is what grants law its authority and effectiveness as a system of social control.

4. Enforceability
   What makes the law binding is the backing of state enforcement mechanisms. This is often referred to as "sanction." If a rule of law is broken, the state applies a pre-determined penalty (a fine, imprisonment, restitution, etc.). This credible threat of enforcement differentiates legal rules from other social norms and incentivizes compliance.

5. Universality
   In an ideal modern legal system (the "Rule of Law"), laws are applied generally and universally. The law is intended to treat every person within its jurisdiction equally, regardless of their status, wealth, or background. This principle ensures fairness and prevents arbitrary use of power by those who enforce the law.

6. Certainty
   Laws must be accessible, knowable, and clear. Legal certainty means that individuals can understand what the law requires of them before they act. This clarity allows people to plan their affairs, enter contracts, and organize their lives with a reasonable expectation of the legal consequences of their actions.

7. Predictability
   Flowing directly from certainty is predictability. A well-functioning legal system ensures that similar cases will be decided in a similar manner (adhering to precedent). This allows citizens and legal professionals to anticipate how courts and enforcement agencies are likely to respond to a given situation, which reinforces trust in the system and aids dispute resolution.

8. Relatively permanent yet dynamic
   Law maintains a careful balance between stability and change. It must be permanent enough to provide a stable backbone for society—people need consistent rules they can rely on over time.

However, the law is also dynamic. Society's values, technologies, economies, and needs to evolve rapidly. The legal system possesses built-in mechanisms (legislative processes, judicial review, constitutional amendments) to adapt, change, and reform the law to remain relevant to contemporary social realities.

9. Social Acceptance
   While the law is formally enforced by the state, its long-term stability relies heavily on general social acceptance and voluntary compliance by the populace. Laws that widely conflict with the prevailing moral sentiments or social norms of a community often become difficult to enforce and lose legitimacy, eventually requiring reform.

10. Prospective, Not Retrospective
    Generally, laws apply to future actions and do not retroactively punish actions that were legal when committed.

PURPOSES OF LAW

The purpose of law has been a subject of debate among jurists for centuries. Law is dynamic, not static, and its objectives change with time, society, and culture. There is no unanimous view regarding its purpose, as different thinkers and legal systems emphasise different goals.

1. Maintaining order and stability
   One of the most fundamental purposes of law is to **maintain order and prevent chaos** in society. Law acts as a regulator of human behaviour and performs essential police functions.

   Plato observed that humans must give themselves law and regulate their lives by it, or else live like wild beasts.

   Hobbes maintained that law limits natural liberty so that individuals do not harm one another but cooperate and unite against common enemies.
   Thus, law ensures **peaceful coexistence** and protects society from disorder.

2. Protection and regulation of freedom
   Another crucial purpose of law is to safeguard individual freedom while maintaining social harmony.

Locke stated that law exists not to abolish freedom but to preserve and enlarge it.

Kant argued that law's aim is freedom, and it must adjust the freedom of each individual with that of others.
Law, therefore, balances liberty with responsibility, creating a framework within which individuals can enjoy freedom safely.

3. Promotion of happiness and social welfare
   Law also seeks to maximise human welfare and happiness.
   Bentham advocated the utilitarian view, stating that law should aim at the **greatest happiness of the greatest number.**

   Holland regarded law as more than a police mechanism; its ultimate purpose is the **highest well-being of society**, promoting collective welfare alongside the protection of rights.
   Law, from this perspective, is an instrument of social progress and public good.

4. Realisation of Justice
   Justice is central to the purpose of law.
   Salmond viewed justice as the ultimate goal, defining law as the set of principles applied by the State in administering justice.

   Justice operates in two senses: distributive justice, which ensures fair division of social benefits and burdens, and corrective justice, which restores balance when wrongs occur.
   Courts administer corrective justice, ensuring fairness and equality before the law.
   The ultimate aim is a **just society**, where like cases are treated alike and legal rights are protected equally.

5. Preservation of social stability
   Law also functions to **maintain social stability and order**.
   Roscoe Pound emphasised that law balances social interests and individual freedom.
   According to **Roscoe Pound**, law serves four important purposes:
   1. **Maintenance of law and order** in society.
   2. **Maintenance of status quo**, ensuring social stability.
   3. **Maximum individual freedom**, allowing individuals to assert themselves.

4. **Maximum satisfaction of human wants**, promoting social welfare.

6. Guidance for human conduct
   Law provides guidance on acceptable behaviour and moral standards.
   Hindu law aims at the welfare of people in this world and salvation after death.

   Mohammedan law focuses on the discipline of the soul, moral improvement, and protection of life, property, and reputation.
   Sir Abdur Rahim described the end of law as promoting the welfare of man both individually and socially, in this life and the next.
   Thus, law acts as a guide for ethical and socially responsible conduct.

7. Facilitation of peaceful social change
   Law must also adapt to evolving social conditions. While it provides stability, it also allows **flexibility** to accommodate new situations and social reforms, thereby preventing disorder, revolution, or violence.
   This dual function of stability and adaptability enables law to guide society toward **orderly and progressive change**.

ADVANTAGES AND DISADVANTAGES OF LAW

Law is an essential institution in society. It provides a framework for governing human behavior, resolving disputes, and ensuring justice. The principles of law have both **advantages and disadvantages**. While law brings **certainty, order, and security**, it also suffers from rigidity, conservatism, and complexity.

A. ADVANTAGES

(1) Provides uniformity and certainty

- One of the greatest advantages of law is that it establishes **fixed principles**, ensuring **uniformity and certainty** in the administration of justice.
- The same law is applied to all cases where facts are similar; there can be no distinction based on personal status or identity.
- Law is **impartial**, acting without respect to personality.
- The legal system is written and publicly accessible, allowing everyone to know the law of the land.

- Uniformity and certainty contribute to the **convenience and happiness of people**, as in the example of traffic laws, which enable millions to travel safely every day.
- In a complex society, law is indispensable for ensuring **safety and order** in daily life.

(2) Protects Against Arbitrary and Biased Decisions

Fixed principles of law **prevent arbitrary or dishonest decisions** by judges.

- Since law is certain and known, any departure from legal rules by a judge is visible and accountable.
- Justice must not only be done but also be **seen to be done**.
- Leaving justice entirely to individual discretion could result in **improper motives or bias** affecting outcomes.

Prominent jurists on this aspect:

- **Salmond**: The influence of law comes more from its impartiality than wisdom.
- **Locke**: Legislatures must dispense justice through standing laws and authorized judges, not arbitrary decrees.
- **Cicero**: "We are the slaves of the law that we may be free."

(3) Protects Against Errors of Individual Judgment

- Fixed laws protect the administration of justice from the fallibility of individual judges.
- Judges are expected to apply the law, not replace it with personal opinions.
- History shows that societies governed by **established legal principles** are happier and more stable than those without laws.
- **Aristotle** warns against trying to be wiser than the law.
- **Salmond** emphasizes that, while law is not always wise, it is **generally wiser than individuals** who administer it.

(4) Provides Reliability

- Law is more reliable than individual judgment because the human mind is fallible.

- The wisdom of the legislature, representing the collective wisdom of the people, is **safer and more consistent** than the momentary judgment of any single judge.

B. DISADVANTAGES

(1) Rigidity of Law

- Law tends to be **rigid** and slow to adapt to the changing needs of society.
- Ideally, the legal system should evolve with social progress, but in practice, there is often a **gap between legal rules and social advancement**, leading to **hardship and injustice**.

(2) Conservatism

- Lawyers and judges often favor **continuation of existing laws**, making the system static.
- This conservatism is **unsuitable for progressive societies**, as law should facilitate growth and change.

(3) Formalism

- Excessive focus on the **form rather than substance** of law can delay justice.
- Time is wasted on **technical objections**, unrelated to the merits of the case.
- This may lead to **injustice**, allowing clever or unscrupulous individuals to exploit technicalities while innocent persons suffer.

(4) Complexity

- Modern societies are complex, and so are their laws.
- Lawyers often create **fine distinctions and hair-splitting arguments**, which do not necessarily advance justice but favor the clever and resourceful.
- **Codification** can simplify law, but it has limits: case law evolves quickly, and codes cannot be updated as frequently as needed.
- Law must remain adaptable, but rigid codification can prevent necessary change.

CLASSIFICATION OF LAW

Sir John Salmond refers to eight kinds of law: imperative law, physical or scientific law, natural or moral law, conventional law, customary law, practical or technical law, international law, or civil law.

1. Imperative Law
   Imperative Law means a rule which prescribes a general course of action imposed by some authority which enforces it by superior power either by physical force or by any other form of compulsion.

   Salmond points out two essential characteristics of imperative law:

   i. Generality
      The command must be a general rule and not a particular command to a specific individual.

      Law must apply equally to all persons falling within its scope.

      Critics argue that absolute generality is neither possible nor desirable, as some laws apply to only specific classes or even individuals.

   ii. Sanction and enforcement
      Laws must be enforced by a competent authority, usually the state.

      Obedience must not depend upon consent or goodwill.

      The coercive force behind law is called sanction, which may include punishment, censure, ridicule, or physical force.

      Sanction is not necessarily punitive but ensures compliance.

   Kinds of Imperative Law:
   Based on the authority from which they proceed, imperative laws are of two kinds:

   i. Divine law
      Commands imposed by God upon human beings, enforced by rewards or punishments in this world or the next.
   ii. Human Law
      Commands imposed by human authorities, further classified as:

- Civil Law – Commands issued by the state and enforced by physical force.
- Law of Positive Morality – rules imposed by society and enforced by public opinion or social disapproval.
- International Law – Rules imposed by the society of States and enforced by international opinion, sanctions or war.

2. Physical or scientific laws

   Accordin to Salmond:

   "Physical Laws or the laws of science are expressions of the uniformities of nature"

   These laws describe the regularity and harmony of natural phenomena, such as the law of gravity or tides.

   Features:

   - They are not man-made.
   - They are immutable, uniform, and universal.
   - They cannot be altered by human will.
   - They merely state what happens, not what ought to happen.

     Unlike human laws, physical laws do not command or prohibit; they simply describe natural facts.

3. Natural or moral laws

   According to Salmond:

   "By natural law or moral law is meant the principles of natural right and wrong or the principles of natural justice."

   Natural law represents moral ideals of justice rather than enforceable legal rules.

   Nature and characteristics:

   - Also called divine law, law of reason, eternal law or unwritten law.
   - Not written in statutes but embedded in human conscience.
   - Appeals to reason and morality, not coercion.
   - Universal and ideal in nature.
   - Does not possess physical sanctions.
   - Exists independently of the states.

Criticism:
Salmond warns that:

- Identifying unjust laws as “not law” may obscure legal obscure legal criticism.
- Law must also be evaluated based on efficacy, convenience, and certainty, not morality alone.
- Punishing acts not illegal at the time contradicts moral fairness.

4. Public law and Private law

   One of the most important classifications of law is into **Public Law** and **Private Law**, based on the nature of the parties involved.

   Public law deals with the relationship between the **State and individuals**. In this category, the State acts as a sovereign authority. Constitutional law, administrative law, and criminal law are included under public law.

   Private law governs relationships between **private individuals**. Here, the State acts only as an arbiter through courts. Laws relating to contracts, torts, property, trusts, and family relations fall under private law.

5. Substantive and Procedural Law

   Law is also classified into **substantive** and **procedural** law.

   Substantive law defines the rights, duties, and liabilities of individuals. Laws relating to contracts, crimes, property, and torts are substantive in nature.

   Procedural law lays down the method and machinery for enforcing substantive rights. The Code of Civil Procedure and the Code of Criminal Procedure are examples of procedural law. Substantive law defines the “ends” of justice, while procedural law provides the “means” to achieve them.

6. Conventional laws
   According to Salmond:
   “Conventional law means any rule or system of rules agreed upon by persons for the regulation of their conduct towards each other.”

   Features:

   - Based on mutual agreement.

- Binding only to the parties who consent.
- Examples: rules of games (football, cricket), voluntary associations.

When such rules are enforced by the state, they become part of the civil law.

Some jurists consider international law a form of conventional law because it is based on agreements between the states.

7. Customary Laws

According to Salmond:
"Customary law means any rule of action which is actually observed by men."

Nature:

- Arises from long-standing practices accepted by society.
- Becomes law when recognised and enforced by the state.
- Based on habits, convenience, imitation, or social approval.

Modern Limitations:

- Customs violating human rights, dignity, equality, public policy, or constitutional mandates are invalid.
- Customs cannot override statute law.

8. Practical or technical laws

Practicalnor technical law consists of rules for achieving specific ends.
Examples: Law of health, law of architecture, law of music, law of style

These rules:

- Are not enforced by the state.
- Indicate what ought to be done to achieve a goal.
- Lack of coercive sanctions.
- Serve as guiding principles, not legal commands.

9. International Laws

International law governs the relations between sovereign states.
According to Oppenheim: Customary and conventional rules legally binding on states.
Salmond: A species of conventional law derived from international agreement.

Sources: treaties and conventions, customs and practices of states.

10. Civil Laws

    According to Salmond:
    "Civil law is the law of the state of the land – the law of lawyers and the law courts."

    Features:

    - It is a positive law enforced by the state.
    - Territorial in nature.
    - Uniform, stable, and authoritative.
    - Creates legal rights and duties.
    - Enforced through courts with sanctions like fines, imprisonment, etc.

    Civil law is the most important and effective form of law, as it is backed by the coercive power of the state.

Holland's classification of law

Holland classifies law according to its function.

1. Private and Public law

   Private Law adjusts relations between individuals. The State acts only as an arbiter. Examples include property law, contract law, tort law, and trusts.

   Public Law regulates the relationship between the State and individuals, with the State acting as an interested and enforcing party.
   Examples include constitutional law, administrative law, criminal law, and criminal procedure. Private and public law together are called municipal law.

2. General and specific laws

   General Law is the territorial law of a country that applies to all persons, acts, and events within the country. Courts take judicial notice of general law.
   Examples in India include the Indian Penal Code and contract law.

   Special Law consists of legal rules that are exceptional or local, which courts do

not take judicial notice of automatically and must be specifically proved.

Types of Special Law:

- Local Law – Customary or enacted for a specific locality (e.g., Bhopal City Improvement Act).
- Foreign Law – Applied when parties from different countries are involved.
- Conventional Law – Based on agreements (e.g., articles of association).
- Autonomic Law – Made by subordinate authorities (e.g., university statutes).
- Martial Law – Temporary law during war/emergency.
- International Law – Administered in Prize Courts during wartime.
- Mercantile Law – Based on merchant customs (e.g., Hundis in India).

3. Substantive and Procedural law

   Substantive Law defines rights, for example, contract law, property law, and criminal law.

   Procedural Law provides remedies and governs the process of enforcing rights, such as civil and criminal procedure codes.

4. Antecedent and Remedial law

   Antecedent Law enforces rights independently, like the law relating to specific performance of a contract.

   Remedial Law provides remedies for violation of rights, such as the law of torts and writs.

5. Law in rem and law in personam

   Law in Rem enforces rights against the whole world, as in ownership, inheritance, and succession.

   Law in Personam enforces rights against specific individuals, as in contracts and trusts.

4. SOURCES OF LAW

CUSTOMS

Among the various sources of law, **customs occupy** a very important place. Historically, it is one of the **oldest sources of law**, originating much before legislation or judicial

precedents. In primitive societies, where there was no organised State or formal legal machinery, human conduct was regulated mainly by customs which people followed as a matter of habit and social obligation. With the growth of society and State authority, many customs gradually acquired **legal recognition** and became enforceable rules of law.

MEANING

A custom may be described as a **long-established practice or course of conduct** which, by continuous and uniform observance, has obtained **legal recognition** and has become binding on those who observe it. It is essentially a social practice which, due to its antiquity, certainty and acceptance by the community, is recognised by courts as law.

DEFINTION

Custom is one of the **oldest and most fundamental sources of law**. It represents rules of conduct that evolve from society over time, gaining recognition and binding force. Scholars have defined custom in various ways:

1. **Salmond:** Custom is *"the embodiment of those principles which have commended themselves to the national conscience as principles of justice and public utility."*
2. **Carter:** Custom is *"the uniformity of conduct of all persons under like circumstances."*
3. **Austin:** Custom is a *rule of conduct spontaneously observed by the governed, not by a political superior.*
4. **Allen:** Custom grows within society through reason, necessity, suggestion, and limitation.

ORIGIN OF CUSTOM

Custom is **the earliest form of law-making**. In primitive societies:

- People followed **habitual practices** because they were convenient or socially accepted.
- Holland emphasizes **conscious choice** for convenience; repetition and imitation led to general observance.
- Maine explains that initial customs promoted the **physical and moral well-being** of the community. Over time, some customs became **irrational or superstitious**, but they persisted due to tradition.

- Bagehot and other sociologists note that **habit and repetition** govern human behavior; imitation ensures social coordination and continuity.
- Vinogradoff observes that **customs evolved organically** within households and clans; formal authorities only recognized them later.

Historical Example:

- Early law was largely **customary**, not created by kings or rulers.
- Sovereigns later **endorsed customs**, giving them legal authority.
- Courts codified customs into **judicial precedents**.
- In England, the **common law** emerged from judicial decisions based on local customs.

CUSTOM AS BINDING FORCE OF LAW

Custom gains **legal recognition** for several reasons:

1. **National Conscience:** Customs embody principles of justice and public policy. Long acceptance signals legitimacy. (Salmond)
2. **Rational Expectation:** Established usage creates an expectation of continuity, fulfilling the principle of **justice and certainty**.
3. **Social Observance:** Widespread adherence reinforces legitimacy (e.g., three days of grace for bills of exchange).
4. **Perceived Societal Utility:** Customs are maintained because they serve the **interests of society**.
5. **Guidance for Law-makers:** (Paton) Customs provide a **foundation for legislation and codification**, reducing the need to create laws de novo.
6. **Legislative Recognition:** Custom can be converted into law by legislative enactments (e.g., New Zealand's Native Rights Act, 1865 recognizing Maori customs).
7. **Judicial Recognition:** Courts adopt customs into law by declaring them binding in **judicial decisions**.

KINDS OF CUSTOMS

Broadly, customs may be classified into **conventional customs** and **legal customs**.

1. Conventional Custom (Usage)

   A **conventional custom**, also referred to as a **usage**, is an established practice that becomes legally binding **only when incorporated into an agreement** between the parties concerned. Unlike legal customs, its authority is not inherent in law; rather, it depends on the **express or implied consent of the parties**.

   For instance, in trade and commerce, parties often rely on established trade practices to interpret the terms of their contracts. The law governing **Bills of Exchange** and most provisions of the **Sale of Goods Act** originated from conventional customs followed by merchants for centuries.

   A conventional custom generally develops in three stages:

   - **Establishment of usage** – The custom must be so well-known within the community that it has acquired notoriety. Its existence is usually proved by evidence.
   - **Judicial recognition** – The courts may recognize the custom through judicial decisions, giving it the force of a precedent.
   - **Codification** – Over time, some customs may be codified into statutory law, thereby becoming part of the formal legal framework.

   Types of conventional customs
   Conventional customs may be **local** or **national**, depending on the area of their application. A custom may also extend internationally if it governs trade practices across countries.

2. Legal Custom

   Legal customs are rules that operate as **binding law independently of any agreement between parties**. Unlike conventional customs, legal customs do not require incorporation into contracts.

   Types of Legal Customs:

   1. **Local Custom:** A local custom is one that prevails in a particular locality. It must be certain, reasonable, continuous, and voluntarily practiced by the community. Local customs cannot violate the rights of other communities or individuals. For

example, a custom allowing villagers to use land from another village without consent was held invalid.

2. **General Custom:** A general custom is recognized throughout the entire realm or country. Historically, general customs formed part of the common law in England and other countries. For example, in India, inheritance practices of the eldest male member of the family before the Hindu Succession Act were recognized as general customs.

ESSENTIALS OF A VALID CUSTOM

For a custom to be legally recognized, it must satisfy several criteria:

1. **Reasonableness:** A custom must be rational and consistent with principles of justice, equity, and public policy. Courts generally presume that a customary practice has a rational basis unless proven otherwise. For example, customs that allow the sale of religious offices for personal gain have been held void.

2. **Consistency with Law:** A valid custom must not contradict statutory law. In India and England, statutory law prevails over conflicting customs. In some legal systems, such as Roman law, a later custom may override an earlier statute.
3. **Compulsory Observance:** A custom must be practiced as a right, not as a matter of individual choice. All members of the affected community must follow it without coercion or permission. For instance, a community custom requiring contributions to maintain a bridge is valid, whereas voluntary contributions are insufficient.

4. **Continuity and Immemorial Antiquity:** A custom must have existed continuously for a long period. In English law, a custom is considered valid if it can be traced to 1189 A.D., the accession of Richard I. In India, there is no fixed date; continuous long-standing usage suffices.

5. **Certainty:** The custom must be clear, unambiguous, and consistently practiced. A custom that is uncertain or transitory cannot create legal rights, such as claiming easement based on tree shadows.

THEORIES OF TRANSFORMATION OF CUSTOMS INTO LAW

1. Historical Theory

The Historical Theory was advocated by legal scholars such as **Savigny, Blackstone, and Sir Henry Maine**.
According to this theory, law originates from the **common consciousness of the people**. Customary observance reflects the practices that have long governed human conduct, and these customs serve as evidence of law rather than being mere law themselves.

- **Savigny** emphasized that law exists because of social practices that have been historically observed.
- **Sir Henry Maine** viewed custom as a formal source of law, stating that customs of the past persist and influence law over time.
- **Manu**, in his treatise, suggested that customs reflect human conduct and continue from the beginning of time, showing that human nature and law are intertwined with customary practices.

Criticisms:
Critics have pointed out several limitations:

- **Not all customs arise from the common will** – As Dr. Allen observed, many customs are imposed by ruling classes for their own convenience and protection, not by the consent of the governed.
- **Local vs. national differences** – As J.C. Gray highlighted, customs are often local and may vary widely within the same country, such as marriage practices differing between communities in India.
- **Judicial involvement** – Sir Henry Maine and Jethro Brown argued that judges sometimes create customs by declaring them, meaning that customs can be **posterior to judicial decisions**, rather than originating spontaneously among people.
- **State power** – Historical theory underestimates the role of the legislature and courts in modifying or abrogating customs.

Thus, while the historical theory highlights the social roots of law, it cannot fully explain the legal recognition and transformation of customs in modern legal systems.

2. Analytical Theory

The Analytical Theory, primarily associated with **John Austin**, regards custom as a **material source of law** that derives its legal force not from its social origin but from **State recognition**. According to Austin:

- A custom becomes law **only when recognized by statute or judicial decision**.
- Courts may use customs for guidance when there is **no applicable statute or precedent**. Once recognized by the courts, customs acquire the status of law.
- For example, the law of **Hundis in India** originated from earlier customs among money-lenders to ensure debt repayment.

Holland and Salmond supported Austin's view to some extent, noting that a custom gains legal validity when it satisfies certain conditions: **reasonableness, immemorial antiquity, compulsory observance, and continuity**. Courts recognize custom as a source of law when these conditions are met.

Criticisms:
Critics argue that Austinian theory underestimates the inherent authority of customs:

- **Dr. Allen** emphasized that **custom is law by its nature**, not merely after judicial recognition. Most customs arise from societal practices regulating human conduct, and people consider themselves bound by them even before formal recognition.
- Custom is enforced by courts **because it is already law**, rather than becoming law only upon judicial sanction.

IMPORTANCE OF CUSTOMARY LAW

Despite the rise of legislation and statutory law, custom continues to influence modern legal systems:

1. **Historical foundation of law** – Common law in England developed from customary rules that regulated social conduct and had popular approval.
2. **Personal law** – In India, codified personal laws for Hindus, Muslims, and other communities often reflect ancient customs recognized by courts over time. Examples include the **Hindu Marriage Act (1955)**, **Hindu Succession Act (1956)**, and **Dowry Prohibition Act (1961)**.

3. **Filling legal gaps** – Courts may rely on custom to resolve ambiguities or inconsistencies in statutory law.
4. **Influence on international and mercantile law** – Customary practices in trade and commerce continue to guide legal decisions globally.

   Modern Challenges:

   - Some customs are outdated or violate fundamental rights. For example, the **Sabarimala Temple entry ban for women** was held unconstitutional by the Supreme Court in 2015.
   - Despite declining significance, custom remains relevant in **personal law, commercial law, and international law**, often serving as a source for developing rational and culturally sensitive legislation.
   - The ongoing discussion about a **Uniform Civil Code in India** highlights how ancient customs need to be reconciled with modern legal principles.

LEGISLATIONS

Legislation is regarded as one of the most important and effective sources of law in the modern legal system. It owes its importance mainly to two reasons. First, it consists of **deliberate law-making** by the legislature. Secondly, it carries the **authority and force of the State**. Because of these features, Dias rightly described legislation as deliberate law-making by an authoritative power recognised as supreme by the courts.

With the advancement of civilisation, legislation has gradually become the **principal source of new law**. In modern States, the legislature no longer merely supplements custom or precedent but actively regulates social, economic and political life through enacted laws.

DEFINITION

The term "legislation" is derived from the Latin words *legis* (law) and *latum* (to make or set), meaning the "making of law."

Salmond - Legislation consists of the declaration of legal rules by a competent authority. In a broad sense, legislation encompasses all methods of law-making. In its strict sense, it refers to enacted or statutory law passed by a supreme or subordinate legislature.

Jurists have differing views on legislation:

Bentham and John Stuart Mill believed legislation includes both the process of law-making and the law resulting from it.

Austin restricted the term to the declaration of rules in statutory form by a competent authority, emphasizing that law without legislative acts cannot exist.

Gray described legislation as the formal utterances of the legislative organs of society.

T.E. Holland argued that legislation includes the making of general orders by judges, equating it to legislation carried out by the sovereign.

TYPES OF LEGISLATIONS

Supreme and Subordinate Legislations

Legislation may be either **supreme** or **subordinate**.

1. Supreme Legislation
   Supreme legislation proceeds from the sovereign power of the State and cannot be annulled or controlled by any other authority.
   In England, Parliament enjoys supreme legislative power.
   In India, Parliament possesses supreme legislative power but is **subject to the Constitution**, which is supreme.

2. Subordinate Legislation

   Subordinate legislation is made by authorities other than the sovereign legislature and depends for its validity on the parent statute. It includes rules, regulations, bye-laws and notifications made under delegated authority.

   For subordinate legislation to be valid, the following conditions must be satisfied:

- The **parent Act** must be constitutionally valid.
- The **delegation clause** must be valid.
- The subordinate legislation must conform to:
    - Substance
    - Procedure
    - Form prescribed by the parent Act
- It must not violate:
    - Fundamental Rights
    - Other constitutional provisions
    - Judicially recognised norms (e.g., retrospective operation, excessive penalties, ouster of court jurisdiction).

Kinds of subordinate legislation:

1. **Colonial Legislation**: British colonies were granted limited self-government, allowing them to make laws that could be repealed by the Imperial legislature. After the Statute of Westminster 1931, Dominions could legislate independently under nominal Crown supremacy.

2. **Executive Legislation**: Legislatures often delegate rule-making to executive departments. These rules have the force of law but may be repealed or amended by the legislature. This has given rise to administrative law, which governs the functions of executive authorities.

3. **Judicial Legislation**: Courts may be empowered to frame rules for regulating their own procedures. In India, the Supreme Court has this power under Article 145, and High Courts under Article 227 of the Constitution.

4. **Municipal Legislation**: Local authorities can make by-laws regulating matters such as property tax, sanitation, and public health.

5. **Autonomous Legislation**: Private entities, such as universities or corporations, may be authorized to make by-laws for regulating their own affairs.

<u>Delegated legislation</u>

Delegated legislation refers to laws made by authorities other than the legislature under powers delegated by the legislature. It may take the form of rules, regulations, orders, schemes, notifications or bye-laws.

There has been a **phenomenal increase in delegated legislation** in modern times, particularly in India, where it now far exceeds primary legislation.

Delegated v Executive Legislation

- **Delegated legislation** derives its authority from a statute.
- **Executive legislation** (Ordinances under Articles 123 and 213) derives its authority directly from the Constitution and operates during legislative recess.

Sub-Delegation

Sub-delegation occurs when delegated power is further delegated. Although generally prohibited by the maxim *delegatus non potest delegare*, it is permissible when expressly authorised or implied by necessity.

Conditional Legislation

Conditional legislation occurs when the legislature enacts a complete law but leaves its enforcement to the executive upon fulfilment of certain conditions. Unlike delegated legislation, **no rule-making power is transferred**.

The distinction was clearly explained in **In re Delhi Laws Act** and **Hamdard Dawakhana v. Union of India**.

LEGISLATION WITH OTHER SOURCES OF LAW

Legislation and Precedent

Legislation is generally considered superior to precedent for several reasons:

Aspect	Legislation	Precedent (Case Law)
Source of Authority	Derives authority from the law-making will of the State	Originates from judicial decisions
Creation	Imposed on courts by the legislature	Created by courts themselves

Nature	Formal declaration of law	Recognition and application of new principles in specific cases
Timing	Enacted before any dispute arises	Comes into existence after a case is decided
Scope	Expressed in comprehensive and general form	Limited to cases with similar facts
Application	Generally prospective (applies to future cases)	Retrospective in nature
Publication	Published and made known before coming into force	Takes effect immediately upon pronouncement of judgment
Purpose	Explicit intention of law-making	Resolving a specific dispute (includes ratio decidendi and obiter dicta)
Accessibility	Easier for the public to know and understand	Often inaccessible or unknown, even to lawyers
Method of Development	Deductive (from general principles)	Inductive (from individual decisions)

Legislation is therefore both constitutive (creating law) and abrogative (able to repeal or amend existing law). Precedent, on the other hand, is merely constitutive and lacks abrogative power.

Legislation and Custom

In earlier times, legislation was supplemental to customary law. In modern times, however, customary law is treated as supplementary to enacted law. Keeton notes that enacted laws are definite, written, comprehensive, and reflect the general will of the people. In contrast, customs become law only after long practice. Legislation differs from custom in several ways:

Aspect	Legislation	Customary Law
Existence	Exists de jure (by law)	Exists de facto (in practice)
Origin	Grows out of theoretical principles	Arises from long-standing practices
Historical Age	Historically more recent	Oldest form of law

Societal Characteristic	Characteristic of modern societies	Developed in primitive societies
Form	Complete, precise, written, and accessible	Mostly unwritten (jus non scriptum) and difficult to trace
Development	Results from deliberate law-making processes	Develops naturally within society
Scope of Governance	Governs relationship between individuals and the State	Regulates relationships between individuals

JUDICIAL PRECEDENTS

INTRODUCTION

Judicial precedent is one of the most important sources of law, particularly in common law countries such as England. It is a distinguishing feature of the English legal system, as much of its law is unwritten and is derived from the decisions of the courts. A judicial precedent refers to a decision made by a court which establishes a principle or rule that must be followed by courts in future cases involving similar facts or issues.

The principle of judicial precedent ensures consistency, predictability, and stability in the legal system. It allows the law to develop gradually and organically, filling gaps where statutory law may be absent. While in England judicial precedent has **authoritative and binding force**, in many continental countries such as Germany, France, and Italy, judicial decisions carry only **persuasive or instructive value** and are not legally binding.

The high quality of English judges, their professional expertise, collaborative approach, and the authority they enjoy within the Royal Court have contributed to the development of a single, coherent system of common law. As Justice J.C. Gray observed, although courts do not formally make laws, they give practical life to statutes by interpreting and applying them in individual cases.

MEANING OF JUDICIAL PRECEDENTS

The doctrine of judicial precedent has been described in both a **loose sense** and a **strict sense**. According to Salmond:

1. **Loose sense:** Judicial precedent refers merely to reported case law that may be cited and considered by the courts as guidance in deciding similar cases. These precedents are not necessarily binding but are persuasive.
2. **Strict sense:** Judicial precedent refers to case law that has binding authority, meaning that courts are legally obliged to follow the principles established in such decisions.

The loose sense is supported by legal scholars such as Holdsworth, while the strict sense emphasizes the **obligatory nature of binding precedents**. Modern debates often focus on whether strict adherence to precedent should always be required, although citing and giving weight to previous judicial decisions remains universally accepted.

DEFINITIONS

Judicial precedent can be defined as a **judicial decision that establishes a principle or rule of law** which courts are bound to follow in future cases involving similar circumstances. According to Jeremy Bentham, precedent is a form of **judge-made law**, while Austin describes it as **judiciary's law**. Keeton defines precedent as a **judicial pronouncement to which authority has been attached**, carrying binding force due to the importance of the issues involved and the high status of judges.

Blackstone, a prominent jurist, explains that judicial precedent ensures that legal principles remain **stable, consistent, and predictable** over time. Once a point of law is solemnly declared in a previous decision, subsequent judges are not free to alter it according to personal opinion. Justice Cardozo similarly emphasized that adherence to precedent should be the rule, though it may be relaxed when a decision is inconsistent with justice or public welfare.

NATURE

The nature of judicial precedent can be summarized as follows:

1. **Constitutive, not abrogative:** Judicial precedent is **constitutive in nature**, meaning it creates law, but it cannot abolish or repeal existing law. Judges can only interpret and develop law but cannot overrule statutes.
2. **Binding on lower courts:** Only decisions from courts higher in the judicial hierarchy carry binding force for lower courts. Equal or coordinate courts are not strictly bound by each other.
3. **Limited to ratio decidendi:** Only the **ratio decidendi**, or the legal reasoning underlying a decision, is binding. **Obiter dicta**, or incidental remarks, are persuasive but not obligatory.
4. **Methods of judicial decision-making:**
    a. **Deductive method:** Associated with codified legal systems, the deductive method applies general legal rules to specific cases. It assumes law is fixed, and judges apply it without altering the rule. While this method ensures stability, it cannot account for legal evolution.
    b. **Inductive method:** Characteristic of the English common law system, the inductive method involves reasoning from particular cases to establish general legal principles. This allows the law to develop through overruling outdated precedents or establishing new norms, providing both flexibility and continuity.
5. **Role in law development:** Judicial precedent complements legislation by filling gaps in law and providing guidance for future cases. It allows the legal system to respond to changing social, economic, and political conditions while maintaining continuity and predictability.

KINDS OF JUDICIAL PRECEDENTS

Broadly speaking, judicial precedents can be classified into **authoritative** and **persuasive** precedents.

(1) Authoritative Precedents

An authoritative precedent is a decision that has **binding force**, meaning that judges are legally obliged to follow it, whether they agree with it or not. Such precedents are usually the decisions of **superior courts**, which are binding on subordinate courts within the hierarchy of courts. In essence, authoritative precedents are considered **legal sources of law**, as they determine the law that must be applied in future cases.

(2) Persuasive Precedents

Persuasive precedents, on the other hand, are those that judges may **consider** but are **not obliged to follow**. These are usually **historical or advisory sources** rather than binding law.
Persuasive precedents can take several forms:

1. **Foreign judgments** – decisions from courts of other countries.
2. **Decisions of superior courts in other parts of the British Empire**.
3. **Judgments of the Privy Council** when acting as the final appellate court for colonies.
4. **Judicial dicta (obiter dicta)** – remarks made by judges that are not part of the ratio decidendi.
5. **Authoritative textbooks and commentaries** by legal scholars.

Position of Judicial Precedents in India

In India, the **Supreme Court's decisions** are **authoritative and binding** on all courts in the country, while the decisions of foreign courts, including the House of Lords, Privy Council, or Supreme Courts of other nations, have only **persuasive value**.
Article 141 of the Indian Constitution gives a **constitutional status** to the doctrine of precedent, stating that the law declared by the Supreme Court is binding on all courts in India.

Historically, under the **Government of India Act, 1935**, the Federal Court and Privy Council decisions were binding on High Courts in British India, but the Federal Court was **not bound** by Privy Council decisions in all matters. After independence, the **Supreme Court became the apex court**, and foreign decisions now hold merely persuasive value.

A precedent may be **authoritative for one court** but only **persuasive for another**, depending on the court's rank and jurisdiction. For example, a High Court decision is authoritative for its subordinate courts but persuasive for High Courts in other states.

THEORIES OF JUDICIAL PRECEDENTS

Declaratory Theory of Precedents

The **declaratory theory** holds that judges **do not make new law** but merely **declare what the law has always been**. Blackstone explained that judges are **law-finders**, not law-makers, who maintain and interpret existing law rather than create new rules.

However, critics like **Jeremy Bentham** and **Austin** argued that the declaratory theory is a **fiction**, used to give judges the appearance of not making law, while in reality, judicial decisions often create new legal principles. This is evident in cases such as:

- **Kesavananda Bharati v. State of Kerala (1973, India)** – overruled Golaknath and introduced the **Basic Structure Doctrine**.

Original/Creative Theory

The original theory holds that judges create a new rule for novel situations when no existing rule applies, thereby establishing a new rule for future cases.

Thus, judicial precedent can **both declare existing law and create new legal principles** when needed.

Ratio Decidendi

The doctrine of **judicial precedent** presupposes a **hierarchy of courts**, meaning that a court is bound by the decisions of courts higher in rank:

- **England:** A High Court judge must follow the Court of Appeal, and the Court of Appeal must follow the House of Lords.
- **India:** All High Courts are bound by the Supreme Court, and subordinate courts are bound by their respective High Courts. However, **one High Court is not bound by another High Court**, though its decisions may have **persuasive value**.

Meaning of Ratio Decidendi

The term **ratio decidendi** literally means **"reason for the decision"**. It is the **legal principle or rule of law** upon which the court's decision is based.

- Ratio decidendi is **distinct from res judicata**:

    - **Ratio decidendi** binds future cases.
    - **Res judicata** refers to the decision between the parties in the specific case and **cannot be disputed again**.

Example (Salmond):

- If **A sues B for negligence in a motor accident**, the decision binds only A and B. But in matters like **nullity of marriage**, the court's decision acts **in rem** and binds the world at large.

Definitions by Jurists

- **Rupert & Cross:** Ratio decidendi is the rule of law expressly or impliedly treated by the judge as necessary to reach the conclusion.
- **Salmond:** It is the law applied by the court or the rule governing the case.
- **Goodhart (Critique of Salmond):**
    - The reason for the decision may not be the ratio, as the case could be based on bad reasoning yet still become authoritative.
    - Ratio decidendi depends on **material facts of the case**, which judges identify, and future courts interpret in relation to their own cases.

Obiter Dicta

Meaning

- **Obiter dicta** literally means **"things said by the way."**
- They are **remarks or observations made by a judge that are not essential to the decision (ratio decidendi)**.
- Such statements are **not binding** on future cases but may have **persuasive value**.

Characteristics

1. Made **in the course of a judgment**, often to illustrate reasoning or refer to hypothetical situations.
2. **Not necessary** for the conclusion of the case.
3. **May be respected** by other courts but are **not obligatory to follow**.

4. Can vary in weight depending on whether they are casual remarks or deliberate opinions on points argued before the court.

Examples

1. **R v. Franklin (1883)**
    a. **Facts:** Franklin stole a box and threw it into the sea, accidentally killing someone.
    b. Ratio Decidendi:
        i. Causing death as a consequence of a wrongful act does not automatically result in manslaughter.
        ii. Gross negligence causing death is manslaughter.
    c. **Obiter Dicta:** Justice Field noted that even if negligence is proven, the accused is not guilty of manslaughter unless the jury finds him so.
2. **S.R. Bommai v. Union of India (1994)**
    a. **Facts:** Constitutional case on secularism.
    b. **Ratio Decidendi:** Secularism is part of the basic structure of the Constitution.
    c. **Obiter Dicta:** Observations by other judges on social pluralism, socialism, social justice, and rights under Articles 15, 16, and 25. These were **not directly in issue** in the case.

Doctrine of Stare Decisis

Meaning

- **Stare decisis** means **"to stand by things decided."**
- It is the principle that courts should **follow earlier decisions** to ensure **consistency, certainty, and predictability** in law.

Features

1. **Hierarchy-based:** Lower courts follow decisions of higher courts.
2. **Binding vs. persuasive:**
    a. Decisions of **higher courts** are binding on lower courts.
    b. Decisions of **courts of the same level** may be persuasive but not binding.

3. **Flexibility:** Courts may **depart from precedent** if there are compelling reasons or public interest considerations.

Application in India

1. **Supreme Court**
    a. Binding on all courts in India.
    b. Not strictly bound by its own previous decisions (exceptions exist for larger benches).
2. **High Courts**
    a. Binding on subordinate courts in the state.
    b. Decisions of one High Court are **persuasive** on another High Court.
3. **Single Bench vs. Division Bench**
    a. Single Bench is bound by Division Bench of same High Court.
    b. Division Bench is not bound by Single Bench decisions.

Stare Decisis vs. Res Judicata

Feature	Stare Decisis	Res Judicata
Operates on	**Ruling of law**	**Decision in the dispute**
Binding on	Everyone, including other parties in future cases	Only parties and their successors
Courts involved	Higher courts' decisions bind lower courts	Applies to all courts
Timing	Effective immediately when decision is made	Effective after time for appeal expires

OVERRULING

- **Definition:** Overruling occurs when a superior court disagrees with the **ratio decidendi** (legal principle) laid down by a lower court in a previous case.
- **Effects:**
    - Does **not** affect the parties in the original overruled case. They remain bound by the old decision under **stare decisis**.

- Can be **express** (explicitly stated) or **implied** (later decisions inconsistent with earlier precedent).
- Can be **prospective**, meaning it applies only to future cases.

Key Distinction:

- Overruling is a tool for **changing legal principles**, while the original parties' rights remain unaffected unless statute provides otherwise.

PROSPECTIVE RULING

- **Purpose:** Avoids injustice caused by giving retroactive effect to new rulings.
- **Historic Case:** *People v. Graves (US, 1932)* – Retroactive overruling caused Elmer Rice to pay back taxes for 3 years; highlighted the hardship of retrospective effect.
- **Principle:** Prospective overruling applies the new rule **only to future cases**, while past transactions remain governed by the old law.
- **Indian Example:** *Golak Nath v. State of Punjab* – Overruled previous constitutional amendment rulings but applied only to future cases.
- **Rationale:** Protects reliance interests, maintains stability, and ensures fairness.

Advantages of Judicial Precedent

1. Reflects social needs; law evolves based on real cases.
2. Practical, concrete, and easier to apply than abstract statute law.
3. Provides certainty and predictability.
4. Offers guidance to judges and saves time for advocates.
5. Flexibility to adapt law to new social conditions (e.g., property rights evolution in India).

Disadvantages of Judicial Precedent

1. Law-reports are voluminous; difficult to find relevant precedents.
2. Conflicting precedents may create confusion.
3. Based only on facts of individual cases; law may be incomplete.
4. Ex post facto nature; law emerges after disputes arise.
5. Binding erroneous decisions can hinder law development.

6. Dependent on chance litigation; no precedent exists unless a case arises.
7. Potentially arbitrary, though mitigated by professional scrutiny and public opinion.
8. Validity can be subjective: number of times cited or judge's reputation?

Overall: Despite drawbacks, precedents remain a key source of law in common law systems (UK, USA, India, etc.) due to their flexibility, certainty, and guidance.

Circumstances Which Destroy or Weaken the Binding Force of Judicial Precedents

The binding force of a precedent may be **destroyed or weakened** under the following circumstances:

1. **Ignorance of statute** – A precedent is not binding if it was decided in ignorance of a relevant statute.
2. **Conflict with a higher court** – If a precedent conflicts with a later decision of a higher court, it loses its binding force.
3. **Conflict with a court of the same rank** – A court is not bound by its own earlier decisions if they conflict with each other.
4. **Precedent sub silentio** – If the point of law was **not argued or considered** in the previous case, it is not binding. Example: **Gerard v. Worth of Paris Ltd. (1936)**.
5. **Equally divided court** – In appellate cases where judges are equally divided, the appeal is dismissed, and the earlier decision stands.
6. **Dissenting judgments** – Dissenting opinions do not bind courts but may influence future decisions.
7. **Erroneous decisions** – Precedents based on misapplied law or mistaken principles lose binding force.
8. **Abrogated decisions** – Decisions may be overruled by statutes, higher court rulings, or subsequent legal developments.
9. **Affirmation or reversal on different grounds** – When a higher court decides a case on grounds different from the lower court, the original decision may retain partial authority but is weakened.